No. 95-5257

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,
*Petitioners,*

v.

UNITED STATES,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT

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(Amicus Curiae, invited by Court, per Order of December 4, 1995)
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## QUESTION PRESENTED

Whether the court of appeals correctly reviewed the district court's determinations that there was reasonable suspicion for the investigatory stop and probable cause for the automobile search under the clearly erroneous standard rather than de novo.

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SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,
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v.

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT

### OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions (J.A. 91-92) is unreported. The judgment (J.A. 93) is noted at 52 F.3d 328 (table). The earlier opinion of the court of appeals vacating the convictions and remanding for further proceedings (J.A. 55-73) is reported at 16 F.3d 714. The recommendations of the magistrate judge (J.A. 7-27, 76-84) and the opinions and orders of the district court (J.A. 28-36, 74-75, 85-90) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 18, 1995. J.A. 93. The petition for a writ of certiorari was filed on July 17, 1995, and was granted

(limited to question 1) on November 6, 1995. J.A. 94. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

This case arises from the discovery of two kilograms of cocaine in the course of an automobile search conducted by Milwaukee County Deputy Sheriffs on December 11, 1992. R 4:1-2.[1] Michael Pautz, a twenty-year veteran assigned to the Drug Enforcement Unit, was engaged in a routine survey of the Suburban Motel parking lot, when a 1981 two-door Oldsmobile with California plates parked outside Room 4 drew his attention. J.A. 9. Based upon his training and experience, Pautz knew that California is a major drug trafficking source state, and that older two-door General Motors vehicles are favorites of drug couriers because of their spacious hidden cavities. J.A. 9; R 49:30-31.

Pautz communicated the license plate information to his dispatcher, who advised him that the vehicle was registered to Miguel Ornelas, with the additional name of Ledesma, though it was unclear whether Ledesma came before or after Ornelas. J.A. 9-10. Pautz learned from the motel clerk that Ismael Ornelas and another individua[l] had checked into Room 4 at 4:00 a.m. without reservations, and were due to leave that morning. J.A. 10.

Pautz called his partner, Donald Hurrle, to the motel. After Hurrle arrived, Pautz contacted the Milwaukee DEA office to run a Narcotics and Dangerous Drugs and Information System (NADDIS) check on Ismael Ornelas and Miguel Ledesma Ornelas. Pautz was told that

[1] The following recitation of facts is based upon those recommended findings of the magistrate judge, J.A. 9-13, 79, that were adopted by the district court, J.A. 28-29, 86, as amplified by the record of the suppression hearing. "R" followed by a volume and page citation refers to the items as numbered in the Saul Ornelas appeal record.



NADDIS had information on both names, that Miguel Ledesma Ornelas a/k/a Miguel Ledesma-Lemus, was a heroin dealer from El Centro, California, while Ismael Ornelas, Jr., of Tucson, Arizona, was a 1,000 kilogram per month cocaine dealer. J.A. 10.[2]

Pautz and Hurrle summoned Lyle Luedke, a narcotics dog handler for the Drug Enforcement Unit. Pautz departed shortly after Luedke arrived with his dog. Hurrle and Luedke took up surveillance and watched as petitioners left Room 4, loaded the trunk and entered the car. J.A. 10-11.

Hurrle and Luedke then drove their separate cars to empty spaces on either side of the Oldsmobile, got out and approached. Hurrle identified himself as a law enforcement officer and asked petitioners whether they had any illegal drugs or contraband. Petitioners responded, almost simultaneously, that they did not. Petitioners produced identifying documents. Ismael Ornelas told Luedke that they had just arrived from California. J.A. 11-12.

Petitioners consented to the officers' request to look inside the car. Saul Ornelas opened the trunk with a key and held it open while Hurrle searched the luggage and trunk area. Hurrle found nothing of interest. Meanwhile, Ismael Ornelas was "calm, but shaking." J.A. 12.

Luedke then began a search of the passenger area. He first determined that the back seat was not loose. J.A. 12. He next examined the right rear armrest area and discovered that a 6" by 10" interior panel "physically felt like it was somewhat loose." R 49:155; *see also* J.A. 12. Based upon his training and nine years' experience in narcotics enforcement (including some 2,000 car searches), together with his knowledge of the other cir-

[2] The officers did not learn until later that the individuals identified in NADDIS were not the individuals who had checked into the Suburban Motel. J.A. 10, 12.

cumstances, Luedke suspected that the loose panel had been removed and that contraband was hidden inside. J.A. 12; R 49:141, 155; R 50:226.

Luedke testified that he noticed rust in the groove of the Phillips screw used to attach a plastic vent cover located in the rear of the right door jamb adjacent to the area of the loose interior panel, which led him to believe that the vent cover had been recently removed. J.A. 12-13; R 49:155-56. Luedke removed the vent cover, exposing a 5" by 4" cavity, saw the top of a paper bag, and reached in to feel a "hard block substance," which he believed to be cocaine. R 49:156-57; *see also* J.A. 13. Unable to remove the bag through the now-open vent, Luedke felt with his hand for the back of the loose panel, which popped open toward the interior of the car. R 49:157; *see also* J.A. 13. Luedke was then able to retrieve the paper bag, which contained a block of cocaine wrapped in foil. R 49:157-58, *see also* J.A. 13. The entire encounter—from the time the officers first approached the Oldsmobile to the discovery of the cocaine—lasted between seven and ten minutes. J.A. 20; *see also* R 50:353.

Petitioners were arrested and later charged with a federal drug trafficking offense. J.A. 7, 13; R 4:1-2. A month later, a United States magistrate judge conducted a three-day hearing on their motion to suppress the fruits of the search pursuant to 28 U.S.C. § 636. J.A. 8. In his recommendations, the magistrate judge concluded that Hurrle and Luedke's initial encounter with petitioners was a lawful *Terry* stop, reasonable in length and supported by reasonable suspicion. J.A. 20-21. He also concluded that petitioners consented to a search of the car, but the consent did not extend to taking apart the interior panel. J.A. 21. Rejecting Luedke's testimony that the vent screw was rusty,[3] the magistrate judge stated that the deputies

[3] The magistrate judge examined the screw himself. *See* R 54:420-21; Government Exhibit AA.



lacked probable cause to justify the search of the cavity in which the cocaine was found. J.A. 22. Nonetheless, he recommended that the suppression motion be denied on the ground that Luedke's dog would have inevitably discovered the cocaine, citing *Nix v. Williams*, 467 U.S. 431 (1984). J.A. 22-23.

On petitioners' objections to the magistrate judge's recommendation, the district court adopted the conclusions concerning reasonable suspicion for the stop and the consent to look through the car. J.A. 28-29. It disagreed, however, with the magistrate judge's conclusion that the officers lacked probable cause to search the interior cavity for contraband, considering the totality of the circumstances, particularly the loose interior panel.[4] J.A. 31-35. The court thus denied petitioners' suppression motion without relying on the inevitable discovery ground. J.A. 30-31 & n.2, 36. Petitioners thereafter pleaded guilty, and were sentenced to substantial terms of imprisonment. J.A. 45-54.

On petitioners' appeal of the denial of their suppression motion, the Seventh Circuit applied a clear error standard of review in accordance with *United States v. Spears*, 965 F.2d 262 (7th Cir.), *cert. denied*, 506 U.S. 989 (1992). It upheld the initial stop as supported by reasonable suspicion, but ruled that it was unable to affirm the district court's probable cause holding on the record before it, because it could not tell whether the magistrate judge (who heard Luedke) had credited Luedke's testimony that the interior side panel felt loose. J.A. 65-66, 68-71. Accordingly, it remanded for a determination as to whether the panel was loose and, if so, whether the

[4] Like the magistrate judge, the district court rejected Luedke's testimony concerning the "rusty" screw, but ruled that probable cause existed prior to the "discovery" of the screw. J.A. 35 n.4.

circumstances amounted to probable cause for the search. J.A. 72-73.[5]

On remand, the district court referred the question of Luedke's loose side panel testimony to the magistrate judge. J.A. 74-75. The magistrate judge announced that he credited Luedke's testimony on the point, but recommended that the suppression motion nonetheless be granted on the ground that, even with the loose panel, the facts and circumstances did not amount to probable cause. J.A. 76-84.

The district court, exercising its obligation to make a de novo determination of the issue, *see* 28 U.S.C. § 636 (b)(1); *United States v. Raddatz*, 447 U.S. 667, 673-76 (1980), rejected the magistrate judge's recommendation. It ruled that, "weighing the evidence 'not in terms of library analysis, but as understood by those versed in the field of law enforcement,'"[6] the "confluence of facts" amounted to probable cause to search behind the loose side panel. J.A. 87.

The Seventh Circuit affirmed the denial of the suppression motion, again applying the clearly erroneous standard. J.A. 91-92.

This Court granted certiorari on the issue whether the court of appeals utilized the appropriate standard of review. J.A. 94. Because petitioners and respondent both took the position that de novo review was required, the undersigned was invited to brief and argue this case, as *amicus curiae*, in support of the court of appeals judgment.

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[5] The Seventh Circuit discounted Luedke's testimony about the "rusty" screw, J.A. 67, and expressly rejected the inevitable discovery ground relied upon by the magistrate judge. J.A. 71-72.

[6] The internal quote is from the plurality opinion in *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).



## SUMMARY OF ARGUMENT

Development of the appropriate standard for appellate review of district court determinations of mixed questions of fact and law turns on an assessment of whether the trial court or the appellate court is "better positioned" to decide the particular issue. The assessment takes account of the characteristics of the question under review and the respective institutional advantages of the federal trial and appellate courts in deciding it. When a mixed question of fact and law involves application of a standard that is "non-technical" in nature to an infinite variety of fact situations—such that a decision in one case will seldom serve as a useful precedent for others—the question is appropriately committed to the district courts, subject to deferential, clearly erroneous review on appeal.

Probable cause and reasonable suspicion determinations require a "non-technical," totality of the circumstances analysis, judged from the perspective of an experienced law enforcement officer. In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court rejected the two-prong test that the Court had developed in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), for evaluating when information from an informant provided probable cause, because probable cause is a "fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," noting that "one determination will seldom be a useful 'precedent' for another." *Id.* at 232, 238 n.11.

The district courts are in the superior position to make the totality of the circumstances probable cause determination, a weighted assessment of physical and testimonial evidence under well-developed, though necessarily general, principles. The clearly erroneous standard strikes the proper balance for appellate review of probable cause and reasonable suspicion determinations, in that it assigns primary responsibility for making this non-technical deter-

mination to the district courts, while preserving the ability of the courts of appeals to correct both legal mistakes and unambiguously erroneous applications of probable cause principles.

Although the parties suggest that this Court's prior decisions have "expressly indicated" that probable cause determinations regarding warrantless searches or arrests should receive "independent review," it is not so. This Court has never directly confronted the question. In any event, "independent review" is not necessarily inconsistent with review under the clearly erroneous standard.

Adoption of the clearly erroneous standard for review of probable cause and reasonable suspicion determinations in federal criminal cases would imply no denigration of Fourth Amendment rights. The clearly erroneous standard of review would apply equally to appeals by defendants following final judgment and to pre-trial appeals by the government where a suppression motion has been granted. A decision as to the appropriate standard of appellate review is Fourth Amendment neutral.

Nor would adoption of the clearly erroneous standard on appeal undermine the preference for warrants. The clearly erroneous standard mandates deference only to decisions of the district courts as to whether there was or was not probable cause. It does not accord deference to law enforcement officers searching without a warrant. The advantages of obtaining a warrant would remain. Evidence gathered in good faith pursuant to a facially valid warrant is admissible even if a reviewing court is convinced that the magistrate's decision to issue it lacked a substantial basis. And in cases where the probable cause issue is close, doubts are resolved in favor of validating the warrant. No such advantages apply in non-warrant cases.

Were this Court to require de novo appellate review of federal district court probable cause and reasonable



suspicion determinations, two types of anomalies would arguably result. First, the Court would be requiring greater appellate scrutiny of decisions made by the district courts after full adversary hearings than is given to the seemingly less reliable decisions of magistrates who issue warrants on the basis of *ex parte* affidavits. Second, the Court would be requiring greater appellate scrutiny of federal district court probable cause and reasonable suspicion determinations than is applied in reviewing the sufficiency of the evidence to support findings of guilt in federal criminal cases. This would be an inversion of the priorities in effect established by this Court in other settings. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *Stone v. Powell*, 428 U.S. 465 (1976).

## ARGUMENT

### THE COURT OF APPEALS WAS CORRECT IN APPLYING THE CLEARLY ERRONEOUS STANDARD IN REVIEWING THE DISTRICT COURT'S RULINGS THAT REASONABLE SUSPICION SUPPORTED THE STOP AND PROBABLE CAUSE SUPPORTED THE AUTOMOBILE SEARCH

This case presents an important question of federal appellate criminal procedure on which the courts of appeals are divided: whether a district court's conclusions as to the existence of probable cause and reasonable suspicion are to be reviewed de novo or under the clearly erroneous standard.[7]

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[7] *Compare, e.g., United States v. Adebayo*, 985 F.2d 1333, 1337 (7th Cir.) (clearly erroneous review), *cert. denied*, 113 S. Ct. 2947 (1993) *with United States v. Normandeau*, 800 F.2d 953, 957 n.5 (9th Cir. 1986) (de novo review). *Adebayo* relied on *United States v. Spears*, 965 F.2d 262, 269-71 (7th Cir.) (clearly erroneous review regarding existence of probable cause for a warrant), *cert. denied*, 506 U.S. 989 (1992), while *Normandeau* relied on *United States v. McConney*, 728 F.2d 1195, 1200-04 (9th Cir.) (*en banc*) (de novo review regarding existence of exigent circumstances), *cert. denied*, 469 U.S. 824 (1984). *Spears* and

**A. Developing the Standard of Appellate Review**

De novo review means a fresh determination of an issue that accords no weight or deference to any prior resolution of it. *See, e.g., Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 23 (1974); *United States v. First City National Bank*, 386 U.S. 361, 368 (1967); *see also Raddatz*, 447 U.S. at 690 (Stewart, J., dissenting).

By contrast, clearly erroneous review requires the appellate court "to uphold any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400

*McConney* represent the most extensive discussions of the issue by the courts of appeals.

A number of courts of appeals have taken inconsistent approaches over time. For example, while the First Circuit now reviews the conclusion as to the existence of probable cause de novo, *United States v. Zapata*, 18 F.3d 971, 975 (1st Cir. 1994), it had previously taken the contrary view, *United States v. Rodriguez-Morales*, 929 F.2d 780, 783 (1st Cir. 1991) ("[W]hether police activity is reasonable in any particular set of circumstances is almost invariably a factbound inquiry. The nisi prius court sees and hears the witnesses and will ordinarily develop a superior 'feel' for what transpired. Hence appellate oversight is correspondingly deferential; the court of appeals reviews the district court's findings of fact following a suppression hearing, including mixed fact/law findings, under the clearly erroneous test."), *cert. denied*, 502 U.S. 1030 (1993).

Similarly, the Sixth Circuit now takes the position that de novo review is required, *United States v. Padro*, 52 F.3d 120, 122 (6th Cir. 1995), whereas it had previously used the clearly erroneous standard, *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1508 (6th Cir. 1988). It has been suggested that the Sixth Circuit shifted its appellate review standard in response to a supposed "hint" in *Williams v. United States*, 500 U.S. 901 (1991), in which the Court granted certiorari, vacated and remanded the case to consider the Solicitor General's position that de novo appellate review is required. *See United States v. Sims*, 975 F.2d 1225, 1238 (6th Cir. 1992), *cert. denied sub nom. Gardner v. United States*, 507 U.S. 932 (1993); *see also United States v. Williams*, 949 F.2d 220, 221-22 (6th Cir. 1991) (on remand), *cert. denied*, 504 U.S. 958 (1992).



(1990). " 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). When the clearly erroneous standard applies, the reviewing court may not reverse the trial court "simply because it is convinced that it would have decided the case differently." *Id.*

Under neither standard does the appellate court abdicate its responsibility to conduct a thorough review of the record. Both standards require that the appellate decision rest "on the entire evidence." *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-500 (1984). The essential difference is that rulings to which the clearly erroneous standard applies are regarded as presumptively correct. *Id.*[8]

It is settled that even though no statute or rule similar to Federal Rule of Civil Procedure 52(a) so requires, a trial court's findings of fact in a criminal case (at least those unrelated to guilt) are subject to review under the clearly erroneous standard. *Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Campbell v. United States*, 373 U.S. 487, 493 (1963). But, as this Court has observed in a variety of settings, distinguishing between legal and factual issues can be quite difficult. *See, e.g., Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995) ("the proper characterization of a question as one of fact or law is sometimes slippery"); *Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("the appropriate methodology for distin-

[8] For this reason, adoption of the clearly erroneous standard of review would not necessarily result in a reduction of effort by the court of appeals in every case. Adoption of the clearly erroneous standard, however, would reduce the incentive to appeal fact-driven determinations, and would logically lead to fewer appeals.

guishing questions of fact from questions of law has been, to say the least, elusive"); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (noting the "vexing nature of the distinction between questions of fact and questions of law," and adding that "[n]or do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion").

As observed in Henry M. Hart, Jr. and Albert M. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 349 (1994):

> Some critics have concluded that "law" cannot be distinguished analytically from "fact" and that at best these terms are nothing more than labels to describe a conclusion about division of function.

While the authors do not advocate abandoning the terms "fact" and "law," they argue persuasively that the decisional process is, realistically, "three-fold": (1) law declaration (*i.e.*, formulation of general propositions broad enough to cover present and future cases), (2) fact identification (*i.e.*, "what happened here") and (3) law application. *Id.* at 350-51. The inability to divide the law application function into separate "fact" and "law" categories in any easy or predictable way stems from the reality that it is an amalgamation of both.

> In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alone effects an artificial cleavage . . . .

Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 233 n.24 (1985) (quoting J. Dick-



inson, *Administrative Justice and the Supremacy of Law in the United States* 55 (1927)) (emphasis in original).

Consistent with these observations, this Court has frankly acknowledged that

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction has at times turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

*Miller v. Fenton*, 474 U.S. at 114. *See also Wilton v. Seven Falls Co.*, 115 S. Ct. 2137, 2144 (1995) (holding that appellate courts must defer to district court expertise with respect to the grant or denial of declaratory relief); *Salve Regina College v. Russell*, 499 U.S. 225, 231-35 (1991) (holding that, in diversity cases, federal appellate courts must review district court rulings as to the content of state law de novo); *Pierce v. Underwood*, 487 U.S. 552, 559-61 (1988) (holding that issue whether government's position was "substantially justified" for purposes of the Equal Access to Justice Act must be reviewed under the deferential abuse of discretion standard).[9] *Cf. First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1926 (1995) ("the reviewing attitude that a court of appeals takes toward a district court should depend upon 'the respective institutional advantages of trial and appellate courts' ") (citations omitted).

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[9] In *Cooter & Gell*, 496 U.S. at 401, the Court noted that the abuse of discretion and clearly erroneous standards, as applied to appellate review of factual determinations, are "indistinguishable." Accordingly, such decisions as *Cooter*, *Wilton* and *Pierce*, that discuss whether an appellate court should apply a deferential abuse of discretion standard of review, provide useful guidance on the question currently before the Court.

Thus, in recent years, the Court has addressed the issue of the standard of appellate review to be applied to particular mixed fact/law questions—where no statute or rule expressly governs the matter—by focusing directly on the characteristics of the question under review, the respective institutional advantages of the federal trial and appellate courts in deciding it, and, at least in some First Amendment cases, whether the "stakes are too great" to entrust the matter to the trier of fact. *See, e.g., Salve Regina College,* 499 U.S. at 231-39; *Harte-Hanks Communications v. Connaughton,* 491 U.S. 657, 686-87 (1989); *Bose Corp.,* 466 U.S. at 501 n.17; *Pullman-Standard v. Swint,* 456 U.S. 273, 287-88 (1982). The difficulty in distinguishing between legal and factual issues also arises in *habeas corpus* cases and the Court employs the same basic methodology, *see, e.g., Thompson v. Keohane; Miller v. Fenton,* though some additional and quite different considerations apply.[10]

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[10] Federal *habeas corpus* review of state court convictions is governed by a statute, 28 U.S.C. § 2254(d), which, by virtue of its roots in *Townsend v. Sain,* 372 U.S. 293 (1963), has been construed as giving the term, "factual issue," relatively narrow scope: "basic, primary or historical facts." *See Thompson v. Keohane,* 116 S. Ct. at 464. *See also id.* at 464-65 (explaining that the term "factual issues" for *habeas* purposes includes not only "what happened" but also matters as to which the state trial court is essentially an eyewitness) (citing, *inter alia, Patton v. Yount,* 467 U.S. 1025 (1984) (juror bias), and *Maggio v. Fulford,* 462 U.S. 111 (1983) (competency to stand trial)).

The Court has repeatedly expressed confidence in state judges' ability to protect the constitutional rights of criminal defendants. *See, e.g., Miller v. Fenton,* 474 U.S. at 117. Nonetheless, in holding that certain fact-driven determinations, such as the voluntariness of confessions, are outside the scope of § 2254(d), the Court has also stressed the need for an "independent federal determination." *Id.* at 110; *see also id.* at 115. One concern that may underlie such holdings—and that reasonably supports a narrower ambit for the term "factual issue" in the *habeas* context than in federal criminal appeals—is the perceived need to insulate certain constitutional



District judges devote much of their time and energy to hearing witnesses and reviewing evidence. As a consequence, their superiority in finding facts is "unchallenged." *Salve Regina College,* 499 U.S. at 233. As the Court stated in *Anderson v. Bessemer City,* 470 U.S. at 574:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.

In recognition of the trial court's expertise as a fact finder, this Court has granted the district courts primacy in making certain fact-intensive mixed fact/law determinations, with only deferential appellate review. *See Cooter & Gell,* 496 U.S. at 402 ("[T]he district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11."). Moreover, where an arguably mixed question of law and fact involves a standard that is "non-technical" in nature and involves "application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case," the issue has been deemed particularly suitable for district court determination, and subject to clearly erroneous review on appeal. *See Commissioner v. Duberstein,* 363

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rights from the influence of community passions on local judges (some of whom are elected). *See, e.g., Patton v. Yount,* 467 U.S. at 1052-53 (Stevens, J., dissenting). Such cases may arguably be characterized as holding that federal district courts, by reason of the independence secured by Article III, are "better positioned" than state trial courts to adjudicate the particular matter at issue. This concern for judicial independence, however, does not affect the division of authority as between federal trial and appellate judges.

U.S. 278, 289 (1960) (discussing determination whether there has been a gift for tax purposes).

Courts of appeals, by contrast, devote primary attention to legal issues, based upon review of refined briefs and collaborative discussion. *Salve Regina College*, 499 U.S. at 232. By nature, they have more time for library analysis and reflection upon matters of broad principle that govern future cases. By the same token, they are necessarily somewhat removed from the give and take of the adversary process, and may not have developed the district courts' "feel," honed by constant practice, for dividing fact from fiction. Thus, while the courts of appeals are able to correct perceived district court errors, the primary justification for the expenditure of substantial appellate judicial resources is, and should be, to develop and clarify the law. *See id.* at 233; *Cooter & Gell*, 496 U.S. at 405; *Pierce v. Underwood*, 487 U.S. at 561.

One principal focus in determining whether appellate review should be deferential or de novo has been whether the resolution of the issue in question will produce a decision of precedential significance. If so, de novo appellate review will further the mission of the courts of appeals in clarifying the law. If, on the other hand, the issue is among the "'[m]any questions that arise in litigation [that] are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization,'" *Pierce v. Underwood*, 487 U.S. at 561-62 (quoting M. Rosenberg, *Judicial Discretion of the District Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 662 (1971)), the question is more appropriately left primarily to the district courts with deferential review on appeal. *See Cooter & Gell*, 496 U.S. at 405 (noting, in reference to *Pierce*'s holding that courts of appeals should review Equal Access to Justice Act awards deferentially, that "[a]n appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish



clear guidelines for lower courts; nor will it clarify the underlying principles of law"). Put another way, de novo review of highly fact-dependent mixed fact/law determinations that are based upon a common-sense, everyday, "totality of the circumstances" analysis, "would very likely contribute only negligibly to the accuracy" of such determinations "at a huge cost in diversion of judicial resources." *Anderson v. Bessemer City*, 470 U.S. at 575.

It is respectfully submitted that, for a number of reasons, the district courts are "better positioned" than the courts of appeals to make probable cause and reasonable suspicion determinations. Further, because such rulings are so frequently tied to specific facts and circumstances, they generally lack the sort of precedential value that would justify the expenditure of appellate resources that de novo review would entail.[11]

### B. Appellate Review of Probable Cause and Reasonable Suspicion Determinations

The starting point for analysis of the appropriate standard of review is an examination of the nature of probable cause and reasonable suspicion determinations. The ancient term, "probable cause," enshrined in the Fourth Amendment, refers to a quantum of proof, the point at which, considering the facts and circumstances, a particular matter is deemed sufficiently probable. To quote Chief Justice Marshall:

> [T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.

*Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813). In modern terms, probable cause is said to exist

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[11] With respect to the expenditure of appellate resources, *see* n.8, *supra*.

at the time of arrest when "the facts and circumstances within [the law enforcement officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [individual arrested] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Probable cause is sometimes defined in part by stating what it is not. *See Illinois v. Gates*, 462 U.S. 213, 235 (1983) (probable cause is not a "[f]inely tuned standard[] such as proof beyond a reasonable doubt or by a preponderance of the evidence"); *id.* ("While an effort to fix some general, numerically precise degree of certainty corresponding to " 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' ") (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

Probable cause never exists in a vacuum. The question is always probable cause with respect to what, such as whether there is probable cause to believe a particular individual arrested is the perpetrator of the crime, or that certain known conduct amounts to a crime, or that contraband is hidden in a particular automobile. The fact that it is applied to a myriad of situations means that developing a set of rules to cover all situations is impracticable.

It would, of course, be helpful to the district courts and law enforcement officers were this Court or the courts of appeals able to formulate a set of rules to provide specific guidance for making probable cause determinations. And, for a time, the Court attempted to do just that with respect to when information from informants, together with other facts, amounted to probable cause. But it is instructive that that effort ultimately foundered.

In the watershed case of *Illinois v. Gates*, the Court abandoned the "two-prong test" developed in *Aguilar v.*



*Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), together with the complex set of rules with which the test had become encrusted, in favor of a single "totality of the circumstances" approach. 462 U.S. at 228-30. In so doing, the Court underscored that the very diversity of the situations in which probable cause is applied precluded the development of a set of specific rules:

> Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, non-technical conception." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175. Our observation in *United States* v. *Cortez*, 449 U.S. 411, 428 (1981), regarding "particularized suspicion," is also applicable to the probable-cause standard:
>
> > "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. As we said in *Adams* v. *Williams*, 407 U.S. 143, 147 (1972): "Informants' tips, like all other clues and

> evidence coming to a policeman on the scene, may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." *Ibid.*

Id. at 231-32.[12]

Accordingly, appellate guidance is limited to such generalizations as that the facts and circumstances are to be evaluated from the perspective of the "trained agent," *Sokolow*, 490 U.S. at 10, that law enforcement officers must be given "fair leeway" to protect the community, *Brinegar*, 338 U.S. at 176, and "[b]ecause many situations . . . are more or less ambiguous, room must be allowed for some mistakes on their part." *Id.* It is also possible to develop some broad baseline principles that can help decide future cases, such as that a totally unsubstantiated and uncorroborated anonymous tip concerning the existence of criminal activity is insufficient to establish probable cause. *See, e.g., Aguilar v. Texas*, 378 U.S. at 113-14.

For the most part, however, "[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another." *Illinois v. Gates*, 462 U.S. at 238 n.11.[13] In short, most probable

[12] The "reasonable suspicion" required for an investigative stop falling short of arrest under *Terry v. Ohio*, 392 U.S. 1 (1968), follows the same "totality of the circumstances" approach as for probable cause, "the only difference being the level of suspicion that must be established." *Alabama v. White*, 496 U.S. 325, 330-31 (1990). Like probable cause, reasonable suspicion is "not readily or even usefully reduced to a neat set of rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

[13] The United States suggests in a footnote that this statement in *Illinois v. Gates* was made "in passing," as if to suggest that it was a random, ill-considered dictum. Brief for the United States at 32 n.14. With all respect, the Court's statement that one probable cause determination will seldom serve as a useful precedent for another is fully consistent with, and indeed simply another means of expressing, the rationale quoted at length above at 19-20 for holding that the two-prong *Aguilar-Spinelli* test was to be discarded.



cause and reasonable suspicion determinations involve "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Pierce v. Underwood*, 487 U.S. at 561-62. For this reason, de novo appellate review in the vast majority of cases would not further the appellate courts' primary function of clarifying and developing the law, and, it is submitted, would not contribute appreciably, if at all, to the accuracy of probable cause and reasonable suspicion determinations.

"Totality of the circumstances" determinations frequently involve a weighted assessment of physical evidence, testimony and issues of credibility. They require, for the most part, not only a scholar's analysis, but a fact-finder's "feel" for the strength of particular pieces of evidence and how the whole fits together, along with a well-developed instinct for the "mainsprings of human conduct." *Duberstein*, 363 U.S. at 289.

In this case, for example, the question whether there was probable cause to take apart the interior side panel of petitioners' car depends upon how the peculiar mix of factual variables would strike an experienced narcotics law enforcement officer. These facts include the two-door eleven-year-old General Motors car with California plates parked outside a motel in Milwaukee in December; the 4 a.m. check-in without reservations; the preliminary information from NADDIS suggesting that both the owner of the car and the individual who checked into the motel might be narcotics dealers; how petitioners reacted when stopped by the Milwaukee Deputy Sheriffs, including that they responded to a question about contraband almost simultaneously; that while one of the petitioners was holding open the trunk for one of the deputies, the other was observed to be "calm, but shaking"; and, finally, that an

officer with nine years of narcotics enforcement experience, including some 2,000 automobile searches, believed that a particular interior panel—known by him to be covering a cavity large enough to secrete a substantial quantity of drugs—felt somewhat loose to the touch.

Many facts could be added, subtracted or modified, and the evidence could be thereby strengthened or weakened, lending greater or lesser support to the conclusion that there was probable cause to take apart the interior panel. The car might have been driven to Milwaukee in the midst of a record cold snap; there might have been no information from NADDIS; the screw on the plastic vent cover might have been rusty, or missing altogether; the panel might have been said to be a "little" or "very" rather than "somewhat" loose; instead of taking apart a single interior panel that felt loose in just a few minutes as Luedke did, the deputies might have testified that all of the interior panels were loose, and spent an hour taking apart the entire car before coming upon the one cavity where drugs were hidden; or the testimony of the officers might have been inconsistent with testimony by a defendant or one another, or otherwise impeached in some degree. The variables are infinite. Attempts to draw bright lines would be futile.

It is submitted that de novo review by the court of appeals in this case could produce little of real precedential value, at least now that decades of intense Fourth Amendment litigation have settled the basic principles of probable cause determination. As the Court stated in *Illinois v. Gates*, "when we move beyond the 'bare bones' affidavits present in cases such as *Nathanson* [*v. United States*, 290 U.S. 41 (1933),] and *Aguilar*, this area simply does not lend itself to a prescribed set of rules like that which had developed from *Spinelli*." 462 U.S. at 239.

In short, probable cause and reasonable suspicion determinations require the very type of fact-intensive law application function that is the forte of the district courts, rather than the more theoretical library analysis of the courts of appeals. To be sure, district courts are capable of making mistakes, or misperceiving the content of settled principles of law. But if a district court makes a legal error, such as applying the wrong standard of analysis, the court of appeals has ample authority to reverse. And where a district court's probable cause conclusion otherwise leaves the court of appeals with the definite and firm conviction that a mistake has been made, the clearly erroneous standard is plainly adequate to correct the error. Where a general proposition capable of application in future cases can be developed, nothing about the clearly erroneous standard would prohibit its enunciation on appeal.



As this very case illustrates, it is not true that clearly erroneous review "is tantamount to no review at all." *Wilton v. Seven Falls Co.*, 115 S. Ct. at 2144 (internal quotation marks omitted). In its first decision, the Seventh Circuit carefully examined the entire record, and determined that many of the district court's conclusions were supported. It ruled, however, that the inevitable discovery ground could not be sustained, as there was no evidence as to the capabilities of the narcotics-sniffing dog. Further, it remanded on the issue whether Luedke's testimony concerning the loose interior panel should be credited, because, upon reviewing the lower court opinions, it was unclear that such a determination had been made, and it was obvious to all that Luedke's testimony about the "rusty" screw had been wrong. Following the remand, Luedke's testimony about the loose panel was credited, the district court concluded that, with that testimony, probable cause existed, and the court of appeals affirmed.

While the probable cause determination was arguably a close call, can it be said that the court of appeals was really in a better position than the district court to make

the common-sense, non-technical judgment whether, from the standpoint of an experienced law enforcement officer, the facts and circumstances suggested strongly enough that there was contraband behind the loose panel sufficient to justify taking it apart? The Seventh Circuit correctly perceived that it was not in such a position.[14]

In sum, the clearly erroneous standard strikes the proper balance for appellate review of probable cause and reasonable suspicion determinations. It leaves to the district courts primary responsibility for making common-sense, non-technical "totality of the circumstances" determinations. At the same time, it frees the courts of appeals from the burden of attempting to identify arguable errors that they are not as well positioned as the district courts to identify, while fully preserving their ability to correct legal mistakes and unambiguously erroneous applications of law to particular factual circumstances.

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[14] It could be argued that since the district court did not actually hear any of the testimony in this case, the court of appeals was in just as good a position as the district court to make the probable cause determination. There are several answers to this. First, as the Court noted in *Bessemer*, deference to the district court's fact-finding ability is based upon its expertise in performing that function on an everyday basis, not just that it may have heard the witnesses. 470 U.S. at 574-75. Further, although the district court in this particular case opted to make its de novo determination under 28 U.S.C. § 636(b) without re-hearing the officers' testimony or calling additional witnesses, it certainly could have re-heard the testimony, viewed the car, or taken other steps if it felt the need. In other words, the district court was in the perfect position to determine whether it had what it needed in terms of evidence, or whether additional inquiry was warranted. A court of appeals' options are more limited. Finally, it would seem unduly complex to have different standards of review for cases in which the district court alone heard the suppression motion and those in which it sought the assistance of a magistrate judge under 28 U.S.C. § 636.



**C. This Court's Prior Decisions**

The United States suggests, without going so far as to invoke *stare decisis*,[15] that this Court has "expressly indicated" that probable cause determinations regarding warrantless searches or arrests are to be accorded "independent review." Brief for the United States at 21.[16] It is respectfully submitted, however, that nothing in the Court's prior decisions forecloses it from choosing the clearly erroneous standard of appellate review for probable cause and reasonable suspicion determinations in the federal courts, as this Court has never directly confronted the question. Where an issue has not been presented in the petition for certiorari, the Court cannot be deemed to have decided it. *See, e.g., Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976).

Moreover, while the United States relies upon language in various decisions suggesting that the Court was conducting "independent review"—a term, incidentally, that is not inconsistent with clearly erroneous review, *see* p. 11, *supra*—it fails to note that, in *United States v. Cortez*, the Court stated with apparent approval that the court of appeals "recognized that 'the ultimate question on appeal is whether the trial judge's finding that founded suspicion was present here was clearly erroneous.'" 499 U.S. at 416.

The United States relies primarily on the following language in *Ker v. California*, 374 U.S. 23, 34 (1963), quoted in *Beck v. Ohio*, 379 U.S. at 92:

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[15] *Stare decisis* would be relatively weak in any event. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). No one acts in reliance on the standard of appellate review of suppression motion rulings in federal criminal cases.

[16] This view is echoed by petitioners and the American Civil Liberties Union (ACLU). Brief for Petitioners at 25-29; Brief Amicus Curiae of the ACLU at 8-17.

> While this court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i.e.*, constitutional—criteria established by this Court have been respected.

In *Ker* and *Beck*, however, the Court did not state that it was utilizing a "de novo" as opposed to a "clearly erroneous" standard of review. Rather, it simply indicated that it will search the entire record, an appellate court practice consistent with both standards. Also, the fact that the Court stated that it would do so "where *necessary* to the determination of constitutional rights" suggests that it will do so only where it has a definite and firm conviction that a mistake has been made, which again is consistent with the clearly erroneous standard of review. Finally, both *Ker* and *Beck* came to the Court on direct review of state court convictions. What may be appropriate for direct review of state court convictions does not necessarily control the Court's allocation of the decision-making function as between the district courts and courts of appeals on fact-intensive issues in federal criminal cases. This Court has no authority to make a similar allocation as between trial and appellate courts in the States' judicial systems.[17]

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[17] The United States notes that in *Bose Corp.*, 466 U.S. at 499, the Court stated that "surely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts." Brief at 22 n.10. But this statement does not purport to address whether this Court may limit the federal courts of appeals' review of district court decisions to a narrower ambit than the Court may deem appropriate for itself on review of state-court judgments.

In any event, the *Bose Corp.* statement must be weighed against *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-13 (1986). In *Icicle*, the Court held that whether an employee falls within an exemption to the Fair Labor Standards Act is a factual question that is subject to clearly erroneous appellate review under Fed. R. Civ. P. 52(a). The court of appeals had utilized a de novo standard in reliance on *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947), in which this Court appeared, at least to the court of appeals, to have applied a de novo standard of review to a similar question under the Motor Carrier Act. This Court, however, expressly stated that *Levinson* should not be understood as bearing on the Rule 52(a) issue, inasmuch as it had come to the Court from the Supreme Court of Illinois, and

> state courts are not required to apply Rule 52(a)—a rule of *federal* procedure—to their own appellate system for reviewing factual determinations of trial courts.

475 U.S. at 712 (emphasis in original).

It would appear that the principles are not crystal clear in this area, and that it is somewhat hazardous to generalize about the appropriate procedure to be applied in federal cases on the basis of cases that come to this Court from state courts.



Potentially more problematic is *Brinegar v. United States*, a federal case in which the Court observed that there was no substantial basis for distinguishing the facts from *Carroll v. United States*, 267 U.S. 132 (1925), and stated that

> [i]n the absence of any significant difference in the facts, it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.

338 U.S. at 171. It is respectfully submitted that this statement reflects a view that cannot be easily reconciled with *Illinois v. Gates*, which post-dates it by some thirty-four years, in which the Court observed that "there are so many variables in the probable-cause equation that one determination will seldom be a useful precedent" for another. 462 U.S. at 238 n.11. It would seem that Justice Jackson's dissenting remarks in *Brinegar*[18] are

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[18] 338 U.S. at 184 (Jackson, J., dissenting) (emphasis in original):

more in accord with the Court's modern understanding of probable cause determinations.[19]

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A second and important distinction is that in the *Carroll* case the lower court had found that the evidence showed probable cause for that search, while in this case two courts below have held that . . . there was not probable cause. If we assume the facts to be indistinguishable, this important distinction emerges from the decisions: *Carroll* held only that these facts *permitted* a District Court, if so convinced, to find probable cause from them. The Court now holds these facts *require* a finding of probable cause. This shift from a permissive to a mandatory basis is a shift of no inconsiderable significance.

[19] Other cases of this Court addressing probable cause and reasonable suspicion often involve a detailed review and analysis of the specific facts and circumstances. *See, e.g., United States v. Cortez*, 449 U.S. at 418-21; *Terry v. Ohio*, 392 U.S. 1, 27-28 (1968). But that does not mean that the Court was choosing the de novo standard of review rather than the clearly erroneous standard, inasmuch as the issue was not presented, *see* p. 25, *supra*, a number of the cases came from state courts, *see* n. 17, *supra*, and, in the cases coming from federal courts, the Court never stated it was reviewing the probable cause and reasonable suspicion determinations de novo.

In *United States v. Sokolow*, for example, the district court denied the suppression motion, but the court of appeals, exercising de novo review, reversed. This Court in turn reversed the court of appeals without comment on the standard of review. Obviously, if the court of appeals reached the wrong conclusion applying a de novo standard, *a fortiori*, its result was wrong if it should have applied the clearly erroneous standard.

Moreover, contrary to the brief of the United States, this Court did not hold that probable cause determinations in civil suits to recover damages for warrantless searches allegedly conducted without probable cause are reviewed de novo. *See* Brief for the United States at 24 n.12. The issue in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), upon which the government relies, had to do with when it is appropriate to grant summary judgment on the issue of qualified immunity in a *Bivens* action founded upon allegations of an unconstitutional search.

The notion expressed by the United States, Brief at 26, that de novo review is required so that this Court and the courts of appeals can perform the function of "expositor of the law," underestimates the extent to which that function can be performed in



**D. Fourth Amendment Values**

The parties suggest that the fact that probable cause and reasonable suspicion determinations are often coterminous with determinations as to whether the Constitution was violated weighs heavily toward de novo review on appeal. Brief for the United States at 29; Brief for Petitioners at 32. But this Court has never held that de novo review of "constitutional facts" is the general rule. Rather, it has affirmatively stated the opposite, that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller v. Fenton*, 474 U.S. at 113 (citing *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534 (1979) (finding of intent to discriminate subject to clearly erroneous standard of review)).

*Bose Corp.* and *Harte-Hanks Communications* are not to the contrary. *Bose Corp.*, in holding that de novo appellate review of actual malice determinations is required, emphasized the Court's historic role in performing a fully independent factual review in First Amendment cases in particular. 466 U.S. at 499, 503-11. *Harte-Hanks*, which re-affirmed *Bose Corp.*, specifically underscored the "unique character of the interest protected by the actual malice standard" in public official defamation cases, adding that "[t]his value must be protected with special vigilance." 491 U.S. at 686, 687.

It would be fallacious to suppose that a failure to adopt a de novo standard of appellate review of probable cause and reasonable suspicion determinations implies a denigration of Fourth Amendment rights. The clearly erroneous standard of review would apply both to district

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the context of clearly erroneous review. If the United States is suggesting that each probable cause and reasonable suspicion determination presents the opportunity to develop the law and could serve as a useful precedent, that view would appear to fly in the face of *Illinois v. Gates*.

court decisions that there was probable cause and that there was not probable cause. The district court's decision is appealable in either case, by the defendant after judgment and by the United States immediately, pursuant to 18 U.S.C. § 3731. The decision as to the appropriate standard of federal appellate review is therefore neutral with respect to the Fourth Amendment.

It might be suggested that to adopt the clearly erroneous standard for appellate review of probable cause decisions in cases not involving warrants would denigrate the warrant requirement. But adoption of the clearly erroneous standard implies no more than that the courts of appeals should give deference to probable cause decisions of district courts. There is no suggestion that any court would be deferring to a police officer's decision to search or arrest without a warrant.

Nor would adoption of the clearly erroneous standard of review remove law enforcement officers' incentives to obtain a warrant. Ample advantages would remain. Evidence gathered pursuant to a facially valid warrant is admissible even if a reviewing court is convinced that the magistrate's decision to issue it lacked a substantial basis. *See United States v. Leon*, 468 U.S. 897 (1984). And unlike in non-warrant search cases, where the probable cause decision is close, doubts are resolved in favor of validating a warrant. *See Illinois v. Gates*, 462 U.S. at 237 n.10; *United States v. Ventresca*, 380 U.S. 102, 109 (1965). In sum, a law enforcement officer who obtains a warrant before searching will justifiably have great comfort in the admissibility of any evidence gathered. To search without a warrant entails greater risk.

**E. Anomalies That Would Result From De Novo Review**

If the Court were to require de novo review of probable cause and reasonable suspicion determinations in cases where there was no warrant, two types of anomalies would arguably result.



First, this Court would be requiring the courts of appeals to apply greater scrutiny to probable cause determinations made in non-warrant cases after a full adversary hearing in the district court than to seemingly less reliable determinations made on the basis of *ex parte* affidavit presentations in warrant cases. *See Massachusetts v. Upton*, 466 U.S. 727, 733 (1984); *Illinois v. Gates*, 462 U.S. at 238-39. While the Court might well regard such a result to be the unavoidable byproduct of a desire to encourage warrants, it would nonetheless appear to be a less than balanced allocation of appellate judicial resources. *See Spears*, 965 F.2d at 270 (discussing Judge Posner's concurrence in *United States v. McKinney*, 919 F.2d 405, 422 (7th Cir. 1990)).

A second type of anomaly that would emerge from requiring de novo review of probable cause and reasonable suspicion determinations in federal cases is that greater appellate scrutiny would then be given to such determinations than to findings of guilt following a bench trial. It has long been the rule in the federal courts that, in reviewing the sufficiency of the evidence to support a conviction, the court of appeals must affirm so long as the evidence, viewed in the light most favorable to the prosecution, could lead a rational trier of fact to find guilt beyond a reasonable doubt. *See, e.g., Glasser v. United States*, 315 U.S. 60, 80 (1942); *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied sub nom. Smith v. United States*, 331 U.S. 837 (1947). *Jackson v. Virgina*, 443 U.S. 307, 318-19 (1978), effectively raised the *Glasser/Curley* standard to constitutional status, in ruling that *In re Winship*, 397 U.S. 358 (1970), required federal courts to review state-court convictions for sufficiency of the evidence on *habeas corpus*. Unlike de novo appellate review, which requires that the court weigh the evidence for itself, however, "this [*Jackson v. Virginia* sufficiency of the evidence] inquiry does not require a court to 'ask itself whether *it* believes that the evidence

at the trial established guilt beyond a reasonable doubt.' " 443 U.S. at 318-19 (emphasis in original).

It is respectfully submitted that the evidence review mandated by *Jackson v. Virginia,* and that is applied on apellate review of federal criminal convictions, is virtually indistinguishable from the clearly erroneous standard of appellate review. To require greater appellate review of Fourth Amendment determinations under the de novo standard, while reviewing findings of guilt under the *Jackson v. Virginia* standard, would seem to be both illogical and an inversion of this Court's established priorities.[20]

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[20] In *Stone v. Powell,* 428 U.S. 465, 495 n.37 (1976), the Court held that where there has been a full and fair opportunity to litigate a motion to suppress in the state courts, the issue would not be cognizable at all on federal *habeas corpus. Jackson v. Virginia,* in holding that sufficiency of the evidence due process challenges would henceforth be cognizable on *habeas,* expressly distinguished *Stone v. Powell,* stating that "[t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." 443 U.S. at 323.

Although *Stone v. Powell* was decided on the basis that to hear Fourth Amendment claims on *habeas* would not further the deterrence purpose behind the exclusionary rule, it would be anomalous to require greater appellate review of Fourth Amendment determinations than findings of guilt in federal criminal cases, on one hand, while on the other requiring federal courts on *habeas* to review state court convictions for sufficiency of the evidence, but not to review Fourth Amendment determinations at all.



## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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(Amicus Curiae, invited by
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